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No. 83-1933 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

GLEN SUTHERLAND

Petitioner

V.

THE STATE BAR OF TEXAS,

Respondent

On Petition of Certiorari
to the
Supreme Court of Texas

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

Jerry L. Zunker
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711
(512) 475-2288
Counsel for Respondent

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SUMMARY OF ARGUMENT

Petitioner Sutherland is attempting to collaterally attack a judgment of conviction in a federal district court in a state court disbarment action. The argument is purely an attack on the federal statute under which he was convicted and alleges no federal question related to the state disciplinary procedures. Accordingly, The Petition of Certiorari should not be granted.

ARGUMENT

INTRODUCTION

On April 3, 1980, Petitioner Glen Sutherland was convicted of a violation of 18 U.S.C. §1962(d), conspiracy to engage in racketeering activities. This conviction occurred in the United States District Court in the Western District of Texas, El Paso Division, cause number EP-79-CR-189, Judge Harry Lee Hudspeth presiding.

Subsequently, the State Bar of Texas filed a disciplinary action against Petitioner Sutherland in a state district court in El Paso, Texas, Petitioner's county of residence. The action was brought under the authority of TEX. REV. CIV. STAT. ANN. art. 320a-1, §16 (Vernon Supp. 1984) (hereinafter the State Bar Act). The pertinent portion of Section 16 of the State Bar Act states the following:

> Provided, however, that on proof of conviction of an attorney in any trial court of competent jurisdiction of any felony involving moral turpitude or of any misdemeanor involving the theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction. An attorney who has been given probation after the conviction, whether adjudicated or unadjudicated, shall be suspended from the practice of law during

> the probation. On proof of final conviction of any felony involving moral turpitude or any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him or her.

Respondent's First Amended Original Formal Complaint, filed December 14, 1981, prayed for Petitioner Sutherland's suspension during appeal and eventual disbarment since he had been assessed prison time as opposed to probation. Sutherland was at that time pursuing his direct federal appeal of the criminal conviction. By the date of the filing of the Bar's First Amended Original Formal Complaint, Sutherland's conviction had been affirmed by the Fifth Circuit Court of Appeals and a Petition for Certiorari was then filed and subsequently rejected by this Court. *See United States v. Sutherland,* 656 F.2d 1181 (5th Cir. 1981), *cert. denied,* 455 U.S. 949 (1982).

After a hearing on the Bar's First Amended Formal Complaint, a judgment dated April 26, 1982, was entered by the Honorable Judge Jerry Woodard, disbarring Petitioner Sutherland. Sutherland appealed this judgment to the Court of Appeals for the Eighth Supreme Judicial District, El Paso, Texas. By judgment and opinion dated November 30, 1983, Petitioner Sutherland's disbarment was affirmed. Petitioner next sought review by way of Writ of Error to the Texas Supreme Court. By letter dated March 7, 1984, the Clerk of the Supreme Court informed the parties that the Application for Writ of Error had been refused with the notation "no reversible error." It is from this action of the Supreme Court of Texas that Petitioner Sutherland now seeks certiorari.

It is Respondent's position that this petition is purely an attempt to use the state courts to collaterally attack a federal court conviction that has been affirmed by the federal appellate system. Sutherland's petition confirms this fact: "Petitioner attacks the underlying Federal conviction as will be discussed." (Petition of Certiorari, P.10). As he has availed himself of every opportunity given him by law to directly appeal his conviction in the federal system, and has failed in his efforts to reverse his conviction, the state courts are in no position to now treat that conviction as anything but a valid, final subsisting judgment.

Rather than complaining of infirmities or deprivations in the state proceedings, the substance of Sutherland's arguments are basically an attack on the federal RICO statutes. Respondent disagrees with Sutherland's contention (Petition of Certiorari, p.2) that..."The Trial Court and the Appellate Courts could not have decided the case against Petitioner without ruling against him on these two questions presented here [in the Petition for Certiorari]." In fact, as can be seen from the opinion of the El Paso Court of Appeals (The full text of this opinion is contained in the Appendix to Sutherland's petition of Certiorari, marked as Exhibit "A"), that court refused to consider the attempted collateral attack.

THE MERITS OF THIS CASE

Under Section 16 of the State Bar Act, conviction of a felony involving moral turpitude, in a court of competent jurisdiction, which results in incarceration, requires disbarment. It has been held in Texas that any felony, not merely an act that would constitute a felony under Texas law, requires enforcement of Section 16 of the State Bar Act. *Muniz v. State*, 575 S.W.2d 408, 413 (Tex. Civ. App. — Corpus Christi 1978, writ ref'd n.r.e.). It has also been held that discipline is mandatory, not discretionary, when proof of the conviction is present. *State Bar of Texas v. Heard*, 603 S.W.2d 829, 832 (Tex. 1980). In the instant case, the El Paso Court of Appeals in reviewing the appeal from the state disbarment action refused to entertain a collateral attack upon the federal conviction with the following language: "In that area [collateral attack], principles of comity dissuade State courts from permitting such attacks upon those judgments. *Ex Parte Garcia*, 560 S.W.2d 948 (Tex. Crim. App. 1978)." (Petition of Certiorari, Appendix Exhibit "A").

In his argument, Petitioner Sutherland makes slight reference to the Texas disciplinary system. His comments are supported by no legal authority and serve merely as a springboard to his attack on the RICO statutes. There is no doubt that this is not an attack on the disciplinary process in Texas, but an attack on a federal statute. Such a collateral attack has been previously rejected by a federal appellate court. *See Laughlin v. United States*, 474 F.2d 444, 454 (D.C. Cir.

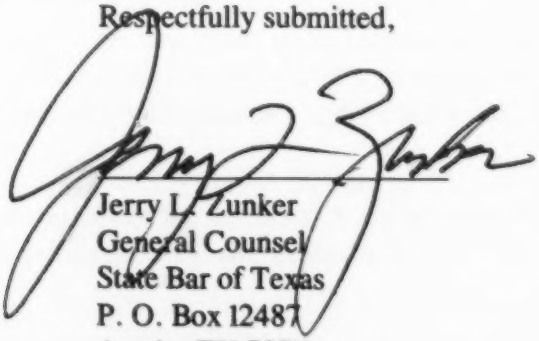
1972), *cert. denied*, 412 U.S. 941 (1973): "The general rule is that a judgment of conviction in a federal court for a felony is binding upon the District Court and the Circuit Court of Appeals and is not subject to collateral attacks in a disbarment proceeding." Examination of the cases cited in *Laughlin* to support the general rule reveals a unanimity on this point. *See In re Tinkoff*, 101 F.2d 341, 343 (7th Cir. 1938), *cert. denied*, 308 U.S. 552 (1939)(proof of felony conviction binds the court in a disciplinary action); *In re Braverman*, 148 F. Supp. 56, 57 (D. Md. 1957). ("The propriety of the conviction cannot be reviewed in this proceeding."); *In re Teitelbaum*, 150 N.E.2d 873, 875 (Ill. 1958), *cert. denied*, 358 U.S. 881, *reh. denied*, 358 U.S. 923 (1958)(record of conviction is conclusive of guilt); *In re Welansky*, 65 N.E.2d 202, 204 (Mass. 1946) (attorney may not retry guilt or innocence in a disciplinary action).

It should be noted that Section 16 of the State Bar Act, in subsection (b), states, in part, that "the record of conviction shall be conclusive evidence of the guilt of the attorney for the crime of which he or she was convicted." Therefore, not only do case authorities forbid Sutherland's collateral attack, but also the very statute upon which this proceeding was instituted compels the same result.

CONCLUSION

In the final analysis, examination of Petitioner's Petition of Certiorari reveals that no aspect of the state attorney disciplinary procedure, the state statutes, or the actions of any state court are challenged on the basis of unconstitutionality under the United States Constitution. This is, essentially, a second appeal of the criminal case. The only relationship between Sutherland's argument and the case now before this Court is the proposition put forward by him that a void federal conviction will not support a state judgment for professional discipline. The federal conviction, however, has been affirmed, it is now final and certainly not void. Appellate remedies have been exercised by Sutherland and he remains convicted. On this basis, the state court may properly consider Glen Sutherland a convicted felon and, as such, remove his privilege of practicing law. The questions Sutherland now presents are basically the same ones he has previously had the opportunity to present to this Court in the direct appeal of his criminal conviction. The Petition for Certiorari should be denied.

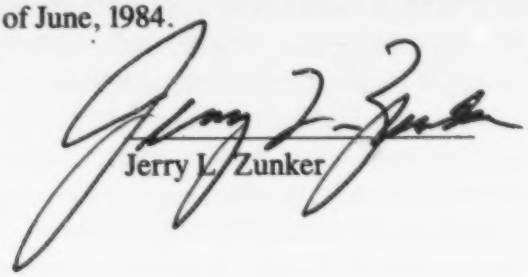
Respectfully submitted,



Jerry L. Zunker
General Counsel
State Bar of Texas
P. O. Box 12487
Austin, TX 78711
(512) 475-2288
Counsel for Respondent

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Brief of Respondent in Opposition to Certiorari has been served on Texas S. Ward, attorney of record for Petitioner Glen Sutherland, 1010 Bassett Tower, El Paso, Texas 79901, by delivery of a true copy to him by certified mail, return receipt requested, by depositing same, enclosed in a postpaid, properly addressed wrapper in an official depository under the care and custody of the United States Postal Service on the 22nd day of June, 1984.



Jerry L. Zunker

APPENDIX

The following is a complete text of Section 16 of the State Bar Act.

Disciplinary proceedings

Sec. 16. (a) No attorney shall be suspended from practice, except by the attorney's concurrence under an order of suspension entered by the grievance committee, until such attorney has been convicted of the charge or charges for disbarment pending against him or her in a court of competent jurisdiction. Provided, however, that on proof of conviction of an attorney in any trial court of competent jurisdiction of any felony involving moral turpitude or of any misdemeanor involving the theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter an order suspending the attorney from the practice of law during the pendency of any appeals from the conviction. An attorney who has been given probation after the conviction, whether adjudicated or unadjudicated, shall be suspended from the practice of law during the probation. On proof of final conviction of any felony involving moral turpitude or any misdemeanor involving theft, embezzlement, or fraudulent misappropriation of money or other property, the district court of the county of the residence of the convicted attorney shall enter a judgment disbarring him or her.

Either the grievance committee for the bar district or the general counsel shall have the authority to seek the enforcement of this section.

(b) In any action seeking to disbar an attorney for acts made the basis of a conviction for a felony involving moral turpitude or a misdemeanor involving theft, embezzlement, a fraudulent misappropriation of money or other property, the record of conviction shall be conclusive evidence of the guilt of attorney for the crime of which he or she was convicted.

(c) Nothing in this Act shall be construed to prevent an attorney from being prosecuted in a disciplinary action after conviction for a criminal act based either on the weight of the conviction or on conduct by the attorney which led to his or her conviction.